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# The IPO Crisis: Title I of the JOBS Act and Why It Does Not Go Far Enough

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## I. INTRODUCTION: THE IPO CRISIS

Financial legislation is a constant balancing act between economic growth and investor protection. That balancing act took center stage when President Obama—as well as legislators from both parties—celebrated the relaxation of corporate financial regulations on April 5, 2012.[1] These new regulatory reductions are known as the Jumpstart Our Business Startups Act (cleverly nicknamed the JOBS Act).[2] President Obama heralded the JOBS Act as helping both businesses and the American people.[3] Many politicians and commentators were particularly excited about Title I of the JOBS Act, which is designed to help young, fast-growing companies go public cheaper, faster, and easier.[4] However, some investor advocates have questioned the changes and fear that the JOBS Act may have put investor protection measures at risk.[5]

Over the past decade, there has been a large decline in the amount of companies going public through initial public offerings (IPOs).[6] According to one study, there was an average of 530 IPOs per year between 1991 and 2000, but an average of only 126 per year between 2001 and 2010.[7] The IPO decline has been caused by multiple factors. Economic challenges and market changes have taken some of the blame.[8] Research has shown that the

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1. *See* President Barack Obama, Remarks by the President at JOBS Act Bill Signing (Apr. 5, 2012) [hereinafter *Remarks by the President*], *available at* http://www.whitehouse.gov/the-press-office/2012/04/05/remarks-president-jobs-act-bill-signing.

2. Jumpstart Our Business Startups (JOBS) Act Pub. L. No. 112–106, 126 Stat. 306 (2012) (codified at 15 U.S.C. §§ 77–78 (2012)).

3. *Remarks by the President*, *supra* note 1. At the signing President Obama said:

> For business owners who want to take their companies to the next level, this bill will make it easier for you to go public. And that's a big deal because going public is a major step towards expanding and hiring more workers. It's a big deal for investors as well, because public companies operate with greater oversight and greater transparency.

*Id.*

4. *See generally* JOBS Act §§ 77–78. *See also* H.R. REP. NO. 112-406, at 6 (2012), *reprinted in* 2012 U.S.C.C.A.N. 289, 279.

5. Investor advocates opposed the bill, fearing that the changes would have an adverse effect on the general public. *See* David S. Hilzenrath, *JOBS Act Could Remove Investor Protections, SEC Chair Schapiro Warns*, WASH. POST, Mar. 14, 2012, http://www.washingtonpost.com/business/economy/jobs-act-could-open-a-door-to-investment-fraud-sec-chief-says/2012/03/14/gIQA1vx1BS_story.html. Mary L. Schapiro, Chairman of the Securities and Exchange Commission (SEC), worried that the JOBS Act would make it easier for companies to deceive investors. *Id.* Jack E. Herstein, president of the North American Securities Administrators Association, added that the JOBS Act "sacrifices essential investor protections without offering any prospects for meaningful, sustainable job growth." *Id.*

6. DAVID WEILD & EDWARD KIM, MARKET STRUCTURE IS CAUSING THE IPO CRISIS – AND MORE 9 (2010), *available at* http://www.grantthornton.com/staticfiles/GTCom/Public%20companies%20and%20capital%20markets/Files/IPO%20crisis%20-%20June%202010%20-%20FINAL.pdf.

7. *Id.* at 3.

8. *Id.* at 5–12. Weild and Kim also identified the Dot-Com Bubble and the recent credit crisis as economic challenges to the IPO market. *Id.* at 3–4. Market changes include the proliferation of

decline in IPOs may also have been caused partially by the increasing costs and time commitment of regulatory compliance under the Sarbanes-Oxley Act of 2002[9] (Sarbanes-Oxley) and other legislation.[10] These regulatory costs have been disproportionally burdensome on smaller public companies because the cost of going and staying public is approximately the same regardless of the size of the company.[11]

The decline in IPOs is a concerning trend for the entire U.S. economy because companies substantially increase hiring after IPOs.[12] IPOs help young companies raise large amounts of capital, which they can use to expand their businesses globally and hire new employees.[13] New public company hiring is vital to growing our economy—between 1980 and 2005, companies "less than five years old accounted for all net job growth in the U.S."[14] Therefore, fewer IPOs means less hiring and lower job growth. IPOs also support innovation and idea generation by providing the capital necessary to turn new ideas into products.[15]

In response to this problem, the U.S. Treasury Department created a task force (the IPO Task Force) to examine what had caused the dramatic decline in IPOs.[16] On October 20, 2011, the IPO Task Force presented its findings and made a series of recommendations.[17] Within a year, the Treasury Department and Congress transformed these recommendations into Title I of

online brokerage accounts, and decimalization of stocks. *Id.* at 6–11.

9. Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley), Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C. §§ 7201–7266 (2012)).

10. IPO TASK FORCE, REBUILDING THE IPO ON-RAMP 9 (2011), *available at* www.sec.gov/info/smallbus/acsec/rebuilding_the_ipo_on-ramp.pdf. The IPO Task Force also identified the Gramm-Leach-Bliley Act of 1999, the Global Analyst Settlement in 2003, and the Dodd-Frank Act as recent legislation that has had a role in the IPO decline. *Id.*

11. *Id.* at 9–10. While the cost of going and staying public is about the same regardless of the size of the company, smaller companies have less revenue and cash to spend on compliance expenses. *Id.* at 10–11.

12. *Id.* at 5. The IPO Task Force study shows that 92% of job creation in public companies happens after a company's IPO. *Id.*

13. *Id.* An IPO is often seen as the most important step in a company's development. *Id.* The large influx of cash allows the company to pursue increased hiring, business expansion, and the acquisition of assets. *See id.*

14. *Id.*

15. *Id.* Companies such as Apple, FedEx, and Starbucks all went public with small IPOs. *Id.* These companies now play a major role in the U.S. economy. *Id.*

16. *Id.* at 1. This task force was comprised of lawyers, accountants, investors, and business leaders. *Id.*

17. *Id.* at 17–31.

the JOBS Act.[18]

Investor advocates, however, continue to question the changes that have been made,[19] and disagreement surrounding Title I's effect has not subsided.[20] This Comment explores the brewing controversy over Title I and assesses the actual impact that it is having (and will have) on investor protection and the IPO market. This Comment argues that Title I has the ability to affect both, but, due to factors outside of Congress's control, will likely have only a minimal effect on either.[21] Part II discusses the objectives of investor protection legislation and how previous legislation regulated the financial markets.[22] Part III explains how these regulations have been changed for emerging growth companies under Title I.[23] Part IV examines what impact Title I will have on investor protection and how this impact may be overstated.[24] Part V discusses Title I's effect on the IPO market and suggests what could be done to improve the JOBS Act and the IPO market.[25] Parts VI and VII conclude this Comment by discussing the changing impact of the JOBS Act from the time this Comment was originally completed in early 2014 to the time it was published in 2015.

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18. Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112–106, 126 Stat. 306 (2012) (codified at 15 U.S.C. §§ 77–78 (2012)). The IPO Task Force's recommendations were incorporated into Title I of the JOBS Act. *Cf.* H.R. REP. NO. 112-406, at 7–8 (2012) (discussing the IPO Task Force's findings).

19. Now that the JOBS Act is in place, critics and journalists have been eager to find more flaws with the legislation. Forbes Magazine contributor Mark Rogowsky used Twitter's IPO filing as an example of the issues presented when a company decides to file confidentially. Mark Rogowsky, *Twitter IPO: Why Filing in Secret Isn't a Win*, FORBES, Sept. 12, 2013, 6:15 PM, http://www.forbes.com/sites/markrogowsky/2013/09/12/twitter-goingpublic-keepingsecrets-full-disclosure-in-the-jobs-act-era/. Comparing Twitter to Facebook and Groupon, Rogowsky argued that the information revealed in a company's publicly filed registration statement is important to small to medium-sized investors because this information helps them make better investments. *Id.*

20. Others saw Twitter's IPO filing as positive for investors. *See, e.g.*, John Berlau, *Twitter, Investors Gain from JOBS Act Regulatory Relief*, HEARTLAND INST. (Oct. 9, 2013), http://news.heartland.org/newspaper-article/2013/10/09/twitter-investors-gain-jobs-act-regulatory-relief. Berlau explained that, due to the JOBS Act, Twitter went public at an earlier stage of growth, which offers "greater opportunity for ordinary shareholders to grow wealthy with the company." *Id.* Berlau and Rogowsky's conflicting conclusions about Twitter's IPO filing illustrates the dissension among commentators about the JOBS Act. *Compare id.*, *with* Rogowsky, *supra* note 19.

21. *See infra* Part V.

22. *See infra* Part II.

23. *See infra* Part III.

24. *See infra* Part IV.

25. *See infra* Part V.

## II. PREVIOUS INVESTOR PROTECTION LEGISLATION

Regulation of the securities industry prior to 1929 was primarily a state function under "blue sky" laws.[26] After the stock market crash of 1929 and the subsequent depression, the Securities Act of 1933 (the Securities Act) and the Securities Exchange Act of 1934 (the Exchange Act) were created at the federal level to help protect investors from fraud and speculation.[27] These two pieces of legislation marked a large shift in securities regulation and laid the foundation for all future financial regulations by the federal government.[28] Initial federal legislation was designed to restore investors' confidence in the financial markets by providing investors with more reliable information and protection against potential harms.[29] Professor Michael Guttentag has identified four primary harms that U.S. securities regulations are designed to protect against: fraud, asymmetrical information,

26. Jonathan R. Macey & Geoffrey P. Miller, *Origin of the Blue Sky Laws*, 70 TEX. L. REV. 347, 348 (1991). Blue sky law is the term used for state securities legislation, and the first blue sky law was created in Kansas in 1911. *Id.* at 361 n.14; *see also* Walter A. La Bar, *Kansas's "Blue Sky" Law*, N.Y. TIMES, Oct. 13, 1911, *available at* http://query.nytimes.com/mem/archive-free/pdf?res=FB0F12F73E5517738DDDAA0994D8415B818DF1D3. The Kansas Blue Sky law, like many that would follow, required firms selling securities to have a license and file financial reports on a regular basis. *See* Act of March 10, 1911, ch. 133, 1911 Kan. Sess. Laws 210.

27. *See generally* Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77a (2012)); Securities Exchange Act of 1934, ch. 404, 48 Stat. 81 (codified as amended at 15 U.S.C. § 78a (2012)). Congress passed four additional statutes during the Great Depression to regulate securities: the Public Utilities Holding Company Act of 1935, the Trust Indenture Act of 1939; the Investment Company Act of 1940; and the Investment Advisors Act of 1940. *See* Elisabeth Keller & Gregory A. Gehlmann, *Introductory Comment: A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, 49 OHIO ST. L.J. 329, 330 (1988).

28. These statutes marked the first time that the federal government would regulate securities sales and also demonstrated a large shift in the focus of the securities regulation. Blue sky laws focused on the substance of the securities and required investments to be fair and just. *See, e.g.*, Act of March 10, 1911, ch. 133, 1911 Kan. Sess. Laws 210. However, the goal of the federal regulations is not to prevent bad investments from being sold. *See infra* Part II.A. Rather, the Securities Act and the Exchange Act focus on the amount of information disclosed about a given security and do not require investments to be fair—or even profitable—for the investor. *See infra* Part II.A. Disclosure requirements allow investors to make their own decisions regarding whether an investment opportunity is suitable. *See* Keller & Gehlmann, *supra* note 27, at 342–43.

29. The Securities Act was created to provide protection for investors as well as promote efficiency, competition, and capital formation. *See* 15 U.S.C. § 77b(b) (2012); *see also The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, SEC. & EXCH. COMM'N, http://www.sec.gov/about/whatwedo.shtml (last visited Jan. 28, 2014) [hereinafter *The Investor's Advocate*].

tunneling,[30] and protecting investors from themselves.[31] Subsequent legislation—most notably, Sarbanes-Oxley and the Dodd-Frank Act—expanded upon these principles by requiring greater financial disclosures and documentation for publicly traded companies.[32]

### A. *The Securities Act and the Exchange Act*

The Securities Act—frequently referred to as the "truth in securities" law—governs the primary market of securities transactions.[33] The goal of the Securities Act was to create efficient financial markets and improved disclosures through the use of a registration process.[34] Companies must file registration forms that include descriptions of the company's business, the type of security for sale, the management of the company, and financial statements that are certified by independent accountants.[35] Through these required disclosures, potential investors can better understand the risks and potential rewards of a particular company's security, and thus, investors can more accurately value the security.[36] However, the detailed disclosures can be very costly to create because they require a large amount of time and involve certification by independent accountants.[37]

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30. Tunneling is the extraction of private benefits from the company by insiders to the detriment of outside investors. Michael D. Guttentag, *Protection from What? Investor Protection and the JOBS Act*, 13 U.C. DAVIS BUS. L.J. 207, 227 (2013).

31. *Id.* at 222–30. Guttentag's determination of these four harms stems primarily from the work of Louis Brandeis and Felix Frankfurter because their work was influential in promulgating federal securities regulation in the early-twentieth century. *Id.* at 222. Guttentag's framework is very helpful because he explains the classical theories, upon which the first securities regulations were based, and relates them to the modern issues presented in today's financial market. *Id.*

32. *See infra* notes 44–63 and accompanying text.

33. Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77a (2012)); *see The Investor's Advocate*, *supra* note 29. The primary market is the sale of securities between the issuing company and the banks underwriting the deal. *The Investor's Advocate*, *supra* note 29. The secondary market is the sale of securities between individual investors and brokers. *Id.*

34. *The Investor's Advocate*, *supra* note 29.

35. Securities Act of 1933, 15 U.S.C. § 77f–77g. Disclosures are filed with the SEC and then made public. *Id.* § 77f.

36. *See, e.g.*, BENJAMIN GRAHAM & SPENCER B. MEREDITH, THE INTERPRETATION OF FINANCIAL STATEMENTS 77 (1937).

37. *See* IPO TASK FORCE, *supra* note 10, at 9. The IPO Task Force estimates an average initial regulatory compliance cost of $2.5 million to go public for a U.S. company. *Id.* However, accounting firm PwC estimates an average cost of between $2.1 million and $4.3 million, depending on the size of the company. PRICEWATERHOUSECOOPERS' DEALS PRACTICE, CONSIDERING AN IPO? THE COSTS OF GOING AND BEING PUBLIC MAY SURPRISE YOU 7 (2012), *available at*

The Exchange Act governs the secondary market of securities transactions and created the SEC.[38] The SEC is the governing and rule-making agency that oversees the secondary market.[39] Under the Exchange Act, the SEC has broad power over almost all aspects of the securities industry.[40] The Exchange Act also increased the amount of disclosures required for public companies.[41] Publicly traded companies must file periodic reports of the company's financial health at the end of each quarter and year.[42] These periodic reports become costly for public companies because they are time-intensive and must be certified by independent accountants.[43]

### B. *Sarbanes-Oxley and the Dodd-Frank Act*

Between 2000 and 2002, a series of accounting fraud and corporate corruption scandals shook America's economy and investors' confidence.[44] The most notable scandal was the fall of Enron, which went from the seventh largest company in America to declaring bankruptcy in less than eighteen months.[45] A group of Enron's officers used deceptive accounting practices to make the company appear to be generating huge revenues when it was actually losing money.[46] To hide the losses, executives set up

http://www.pwc.com/en_us/us/transaction-services/publications/assets/pwc-cost-of-ipo.pdf.

38. *See* Securities Exchange Act of 1934, 15 U.S.C. §§ 78b, 78d; *see also The Investor's Advocate*, *supra* note 29.

39. 15 U.S.C. § 78d (2012).

40. *Id.* For example, the SEC oversees all public offering registrations, regulates brokerage firms, and has power over self-regulating organizations (SROs). *The Investor's Advocate*, *supra* note 29.

41. *See generally* 15 U.S.C. § 78m (2012).

42. *Id.* § 78m(a).

43. The annual financial reports must be certified by independent public accountants. *Id.* § 78m(a)(2) (2012). The IPO Task Force estimated an ongoing regulatory compliance cost of $1.5 million per year to stay public. IPO TASK FORCE, *supra* note 10, at 9.

44. *See generally* William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1276 (2002).

45. *Id.* Enron stockowners watched in horror as the value of Enron's shares eroded from over ninety dollars per share in August 2000 to approximately sixty cents by December 2001. *Id.* at 1276–77.

46. Dan Ackman, *Enron the Incredible*, FORBES, Jan. 15, 2002, 12:00 PM, http://www.forbes.com/2002/01/15/0115enron.html. Because of an accounting loophole, Enron was able to report the revenue of some energy contracts at their gross value instead of at the net value as is done with other similar transactions. *Id.* Enron would also buy and sell the same asset multiple

offshore entities and funneled the losses to those accounts.[47] Once these misleading practices became public knowledge, the company unraveled, and many of the officers were criminally charged.[48] Enron may have been the worst example of accounting fraud, but it was not the only one.[49] As public outcry grew, Sarbanes-Oxley was rushed into law in July of 2002.[50]

Sarbanes-Oxley included many accounting and corporate reforms to prevent future accounting scandals.[51] It was intended to increase investor confidence by imposing higher penalties—including criminal liability—on deceitful corporate officers and by requiring public companies to improve accounting practices and financial disclosures.[52] Sarbanes-Oxley created many new requirements for public companies, including new financial disclosure requirements[53] and heightened auditing standards, and imposed criminal liability on corporate officers for fraudulent reporting.[54] It also established the Public Company Accounting Oversight Board (PCAOB) to oversee company auditing and standards.[55]

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times so it could report revenues far greater than what they actually sold. *Id.*

47. *See* Bill Saporito, *How Fastow Helped Enron Fall*, TIME MAG., Feb. 10, 2002, http://content.time.com/time/business/article/0,8599,201871,00.html. Enron's Chief Financial Officer, Andrew Fastow, created hundreds of "special purpose entities" to hide Enron's debt, yet Enron never lost control of the assets that carried the debt. *Id.*; *see also* Ackman, *supra* note 46.

48. Charges included securities fraud, wire fraud, and insider trading. *Breakdown of the Charges Against Enron's Top Officers*, N.Y. TIMES, Jan. 18, 2006, http://www.nytimes.com/2006/01/18/business/worldbusiness/18iht-web.0118enron.charges.html.

49. Other notable scandals included Arthur Andersen, WorldCom, and Tyco International. Ackman, *supra* note 46.

50. *See* George W. Bush, President of the United States, President Bush Signs Corporate Corruption Bill (July 30, 2002, 10:15 AM), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2002/07/20020730.html. At the signing, President George W. Bush proclaimed:

> My administration pressed for greater corporate integrity. A united Congress has written it into law. And today I sign the most far-reaching reforms of American business practices since the time of Franklin Delano Roosevelt. This new law sends very clear messages that all concerned must heed. This law says to every dishonest corporate leader: you will be exposed and punished; the era of low standards and false profits is over; no boardroom in America is above or beyond the law.

*Id.*

51. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C. §§ 7201–7266 (2012)). The reforms vary from the creation of a new accounting oversight board, *see id.* § 7211 (2012), to enhanced financial disclosures, *see id.* § 7261, to white-collar crime penalty enhancements, *see* Corporate Criminal Fraud Accountability Act of 2002, 18 U.S.C. § 1341 (2012).

52. *See The Investor's Advocate*, *supra* note 29. *See generally* 15 U.S.C. §§ 7201–7266.

53. 15 U.S.C. § 7261.

54. 18 U.S.C. §§ 1341, 1505 (2012).

55. 15 U.S.C. § 7211.

However, Sarbanes-Oxley's benefits came with increased costs for public companies.[56] For example, the annual cost of accounting and legal fees approximately doubled for middle-market public companies after Sarbanes-Oxley.[57] The high reform costs disproportionately affected smaller business,[58] and these costs were much higher than anyone expected at the time Sarbanes-Oxley was signed into law.[59]

Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) in response to the 2008 financial crisis.[60] The Dodd-Frank Act increased regulation and oversight of the financial industry to prevent the catastrophic financial failures of 2007 and 2008.[61] Among other things, the Dodd-Frank Act increases investor protection through greater regulations such as requiring companies to

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56. Gregory C. Leon, *Stigmata: The Stain of Sarbanes-Oxley on U.S. Capital Markets*, 9 DUQ. BUS. L.J. 125, 147 (2007). A study that polled senior management at various public companies found that the cost of being public (including D&O insurance, accounting and legal fees, and board compensation) for a middle-market company rose 90.4% after the introduction of the Sarbanes-Oxley reforms. *Id.*

57. *Id.* Annual accounting fees increased by 105.3% (from $243,000 before reform to $499,000 after), and annual legal fees increased 90.6% (from $212,000 before reform to $404,000 after). *Id.*

58. *See* Christopher Cox, *Testimony: Sarbanes-Oxley Section 404: New Evidence on the Cost for Small Companies,* SEC (Dec. 12, 2007), http://www.sec.gov/news/testimony/2007/ts121207cc.htm ("[S]maller firms spend far more per employee than larger firms to comply with federal regulations, including those of the SEC."); *see also* Regina F. Burch, *Financial Regulatory Reform Post-Financial Crisis: Unintended Consequences for Small Businesses*, 115 PENN ST. L. REV. 409, 413 (2010).

59. *See* Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779, 1781–82 (2011). First year costs were sixteen times higher than the SEC expected for smaller companies. *Id.*

60. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111–203, 124 Stat. 1376 (2010). The 2008 financial crisis, also known as the Global Financial Crisis, was sparked when the United States housing market began to fall in 2006. *See, e.g.*, Shawn Tully, *Welcome to the Dead Zone*, CNN MONEY (May 5, 2006, 12:14 PM), http://money.cnn.com/2006/05/03/news/economy/realestateguide_fortune/. The fall in housing prices decreased the value of securities tied to the housing market—such as mortgage-backed securities, collateralized debt obligations, and credit default swaps—and threatened the solvency of many major banks. *See* Michael Simkovic, *Competition and Crisis in Mortgage Securitization*, 88 IND. L.J. 213 (2013); Michael Simkovic, *Secret Liens and the Financial Crisis of 2008*, 83 AM. BANKR. L.J. 253 (2009).

61. S. REP. No. 111-176, at 2 (2010). Congress passed the Dodd-Frank Act to "establish[] a new framework to prevent a recurrence or mitigate the impact of financial crises that could cripple financial markets and damage the economy." *Id.*; *see also* Helene Cooper, *Obama Signs Overhaul of Financial System*, N.Y. TIMES, July 21, 2010, http://www.nytimes.com/2010/07/22/business/22regulate.html?_r=0. President Obama said, "because of this law, the American people will never again be asked to foot the bill for Wall Street's mistakes." *Id.* (internal quotation marks omitted).

produce even more audit information[62] and increasing executive accountability by mandating compensation disclosures.[63]

## III. CHANGING THE RULES FOR EMERGING GROWTH COMPANIES

The above regulations improved investor safety, but depressed the market for small-company IPOs.[64] Thus, Congress decided to change the rules for these small companies.[65] When drafting Title I of the JOBS Act, the House of Representatives relied heavily on the IPO Task Force's research and recommendations, so the IPO Task Force's report is a helpful reference when discussing Title I.[66] The IPO Task Force believed the problem was clear: the dramatic decline in the number of IPOs was hurting job growth.[67] The IPO Task Force identified the causes of the decline and recommended regulatory change to increase the number of IPOs.[68]

The IPO Task Force found that a "series of changes" in regulations and in the market had "driven up costs for emerging growth companies looking to go public."[69] Previous regulations—including the Securities Act, the Exchange Act, Sarbanes-Oxley, and the Dodd-Frank Act—were designed with large companies in mind, and smaller companies were unfairly affected.[70] Determined to fix this problem, the IPO Task Force recommended an IPO "On-Ramp" that would create a new category of

62. Dodd-Frank Act, Pub. L. No. 111-203, § 929J.

63. *Id.* §§ 951–957.

64. The compounding costs of the Securities Act, the Exchange Act, Sarbanes-Oxley, and the Dodd-Frank Act disproportionately affected smaller companies because smaller companies typically have less capital to spend on compliance costs. IPO TASK FORCE, *supra* note 10, at 9.

65. Title I "provides temporary regulatory relief to small companies, which encourages them to go public." H.R. REP. No. 112-406, at 6 (2012).

66. *See infra* notes 67–73 and accompanying text.

67. "This trend has . . . hobbled U.S. job creation. In fact, by one estimate, the decline of the U.S. IPO market had cost America as many as 22 million jobs through 2009." IPO TASK FORCE, *supra* note 10, at 1.

68. *See generally id.*

69. *Id.* at 8. The JOBS Act does not attempt to directly change the "market" changes identified by the IPO Task Force, but it is safe to say that the IPO Task Force did not believe its recommendations would solve *all* the problems facing the IPO market. *See id.*

70. *Id.* ("In most cases, the regulations were intended to address market issues created exclusively by the behavior of, and risks presented by, the largest companies. While some regulations succeeded in this aim, almost all of them have created unintended adverse effects on emerging growth companies looking to access public capital.").

issuer—the emerging growth company (EGC)[71]—and reduce regulatory burdens and costs on this new category of issuer.[72] The desired result was to encourage these small, fast-growing companies to go public sooner and cheaper.[73]

### A. *Defining the Emerging Growth Company*

The first IPO Task Force recommendation adopted was the creation of a new class of issuer known as the EGC.[74] An EGC is "an issuer that had total annual gross revenues of less than $1,000,000,000 . . . during its most recently completed fiscal year."[75] A company may keep EGC designation for the five years following its IPO unless it (1) makes over $1 billion in revenue in a fiscal year; (2) issues more than $1 billion in non-convertible debt over a three-year period; or (3) is deemed to be a "large accelerated filer."[76] If one of these triggering events occurs, the company can no longer take advantage of Title I.[77]

### B. *Scaled Financial Disclosures and Relaxed Accounting Standards*

The IPO Task Force recommended reducing the amount of required financial disclosures for EGCs because this would reduce costs and encourage EGCs to go and stay public.[78] The JOBS Act amendments

71. *See infra* notes 74–77 and accompanying text.

72. *See infra* notes 78–94 and accompanying text.

73. *See supra* note 65.

74. *See* 15 U.S.C. § 77b(a)(19) (2012); IPO TASK FORCE, *supra* note 10, at 2.

75. 15 U.S.C. § 77b(a)(19). The $1 billion dollar figure is to be adjusted every five years for inflation. *Id.* Throughout this Comment, this rule will be referred to as the "revenue cap" and the revenue-based test.

76. *Id.* A large accelerated filer is an issuer that, at the end of its fiscal year, has a market value of common equity valued at more than $700 million at the end of the issuer's second fiscal quarter, the issuer is subject to the disclosure requirements of the Securities Act, the issuer filed an annual report under the Securities Act, and the issuer is not eligible to use the requirements of a smaller reporting company. 17 C.F.R. § 240.12b-2 (2014).

77. 15 U.S.C. § 77b(a)(19). Under section 107 of the JOBS Act, a company may choose to forgo EGC treatment and comply with the requirements that apply to non-EGCs if the company elects to do so at the time it files its registration statement with the SEC. Jumpstart Our Business Startups (JOBS) Act § 107, Pub. L. No. 112–106, 126 Stat. 306 (2012).

78. IPO TASK FORCE, *supra* note 10, at 21–22. The IPO Task Force believed scaled regulatory and disclosure requirements would help reduce these costs. *Id.* The Task Force believed reducing the costs of going public would encourage more EGCs to seek capital from public markets. *Id.*

include scaled financial disclosure requirements,[79] an accounting standards "transition" period,[80] and a scaled executive compensation disclosure requirement.[81]

Under the Securities Act, companies filing for an IPO are required to provide three years of audited financial statements with their registration statement,[82] but an EGC may elect to provide only two years of audited financial statements under the JOBS Act.[83] The Exchange Act requires that public companies provide five years of financial statements with their annual reports,[84] but EGCs are exempt from this requirement for their first two or three years as a public company (unless they lose their EGC status).[85]

The JOBS Act also amended Sarbanes-Oxley to allow EGCs to take advantage of an accounting transition period.[86] During this transition period, EGCs are exempt from any new accounting rules made by the PCAOB.[87] They are also exempt from any future mandatory audit firm rotation[88] and

79. *See infra* notes 82–85 and accompanying text.

80. *See infra* notes 86–90 and accompanying text.

81. *See infra* notes 91–94 and accompanying text.

82. 15 U.S.C. §§ 77g(a)(1), 77aa. When looking at the schedule of information required in a registration statement, it is easy to understand why this process is currently time consuming. *See id.* § 77aa.

83. *Id.* § 77g(a)(2) (stating that an EGC "need not present more than 2 years of audited financial statements").

84. 15 U.S.C. § 78m(a); 17 C.F.R. § 229.301. The required financial disclosures include "net sales or operating revenues; income (loss) from continuing operations; income (loss) from continuing operations per common share; total assets; long-term obligations and redeemable preferred stock . . . and cash dividends declared per common share." 17 C.F.R. § 229.301.

85. 15 U.S.C. § 78m(a). The five years of disclosure includes the three years disclosed at the IPO filing, so if an EGC elects to only file two years of audited financial statements, it will takethree years to reach the total of five years of disclosures. *See supra* notes 82–84 and accompanying text. However, if they elect to file the full three years of audited financial statements, it will only take the company two years to reach five years of disclosures. *See supra* notes 82–84 and accompanying text.

86. 15 U.S.C. § 7213(a)(3)(C) (2012).

87. *Id.*

88. *Id.* Since the Enron scandal, regulators have pushed for a requirement that accounting firms rotate between public companies every few years to improve the independence and objectivity of accountants. Sarah A. Core, *Only Fools Rush In: Mandatory Audit Firm Rotation and the PCAOB*, 17 N.C. BANKING INST. 137, 138–39 (2013). Some believe that restricting the number of years an accounting firm can work for a particular company will minimize the risk of conflicts of interest developing between auditors and the companies they are auditing. *See id.* at 139. The PCAOB is currently advocating this requirement, but many others have doubts about how effectively this would eliminate conflicts of interest. *See, e.g.*, *id.* at 164–65.

any supplements to the auditor reports that would require these issuers to provide additional information about the audit or their financial statements.[89] However, Congress gave the SEC discretion to determine whether new accounting requirements should be effective immediately for EGCs.[90]

The Dodd-Frank Act amended the Exchange Act and requires that companies disclose executive compensation when the company is involved in "an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all the assets of an issuer . . . ."[91] The Dodd-Frank Act also gives shareholders the ability to have a non-binding proxy vote on the appropriateness of the executives' compensation.[92] Under Title I, EGCs may elect to exempt themselves from these two requirements.[93] Title I also exempts EGCs from the Dodd-Frank Act's requirement that publicly traded companies disclose a ratio comparing the CEO's compensation to the median compensation of all other employees.[94]

### C. *Relaxed Communication Regulations*

The IPO Task Force also concluded that the amount of information about EGCs available to investors was lagging behind larger public companies.[95] Limited information on EGCs "adversely impacts trading

89. 15 U.S.C. § 7213(a)(3)(C).

90. *Id.* New or additional accounting rules adopted will not apply for EGCs "unless the Commission determines that the application of such additional requirements is necessary or appropriate in the public interest, after considering the protection of investors and whether the action will promote efficiency, competition, and capital formation." *Id.*

91. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 § 951, Pub. L. No. 111–203, 124 Stat. 1376 (2010) (amending 15 U.S.C. § 78n-1).

92. 15 U.S.C. § 78n-1(b)–(c) (2012). The sponsors believed executive disclosures would prevent executives from giving themselves large bonuses based on short-term goals. *See* S. REP. NO. 111-176, at 35; U.S. SENATE COMM. ON HOUS., BANKING, & URBAN AFFAIRS, SUMMARY: RESTORING AMERICAN FINANCIAL STABILITY 9 (2009), *available at* http://www.banking.senate.gov/public/_files/FinancialReformSummaryAsFiled.pdf. These bonuses, the sponsors argue, incentivize risk taking and excessive leverage, which threaten the stability of large corporations and the economy. S. REP. NO. 111-176, at 35.

93. 15 U.S.C. § 78n-1(e)(2) (2012). Though the financial barriers created by Sarbanes-Oxley are well documented, there is little research on how much time and money the Dodd-Frank Act is currently costing public corporations.

94. *Compare* 15 U.S.C. § 78n-1(b), *with* 15 U.S.C. § 78n-1(e). *See also* H.R. REP. NO. 112-406, at 14 (2012).

95. IPO TASK FORCE, *supra* note 10, at 26. The IPO Task Force blamed "economic and regulatory pressures" for reducing research budgets at most investment banks. *Id.*

volumes, company market capitalizations and the total mix of information available to market participants."[96] Thus, the IPO Task force recommended improving the availability and flow of information about EGCs.[97] To serve this goal, Title I allows EGCs to file their initial registration statements with the SEC confidentially,[98] lifts "testing the waters" restrictions,[99] and partially lifts some research analyst bans.[100]

Under Title I, an EGC may elect to file its initial registration statement confidentially with the SEC.[101] Foreign private issuers have always been allowed to file their initial registration statement confidentially with the SEC, but public U.S. companies have previously been required to file publicly.[102] Confidential filings allow EGCs to discover any concerns the SEC may have with their filing without revealing company information to the public.[103] The company may then resolve any issues prior to the registration statement becoming public.[104]

Under the Securities Act, an issuer may not communicate with potential investors about the issuer's potential IPO until a registration statement is in effect.[105] This restriction no longer applies to EGCs because the JOBS Act allows EGCs to "test the waters"—gauge interest in their offering—with qualified institutional buyers and accredited institutional investors before and after filing their registration statement with the SEC.[106] This amendment

96. *Id.*

97. *Id.*

98. 15 U.S.C. § 77f(e) (2012); *see also infra* notes 101–04 and accompanying text.

99. 15 U.S.C. § 77e(a)(1) (2012); *see also infra* notes 105–08 and accompanying text.

100. 15 U.S.C. §§ 78o-6(a), 77b(a)(3) (2012); *see also infra* notes 109–14 and accompanying text.

101. 15 U.S.C. § 77f(e) (2012). However, the registration statement must become public at least 21 days prior to the issuer's road show presentations ("road shows" are when the management of an issuing company gives presentations to analysts, fund managers and potential investors in order to generate excitement for the IPO). *Id.*; *see* 17 C.F.R. § 230.433 (2014). The goal of the confidential filing is to allow the EGC to resolve any issues with its statement; this will likely be enough time for them to resolve any concerns prior to its road show. *See* H.R. REP. NO. 112-406, at 7 (2012).

102. 15 U.S.C. § 77f(d); *see also* IPO TASK FORCE, *supra* note 10, at 29.

103. IPO TASK FORCE, *supra* note 10, at 29.

104. *See supra* note 102. When an issuer files publicly and the SEC questions the issuer's registration statement, it typically generates bad publicity and may affect the market for the IPO. *See* Shayndi Raice & Nick Wingfield, *Groupon Accounting Lingo Gets Scrutiny*, WALL ST. J., July 28, 2011, http://online.wsj.com/news/articles/SB10001424053111903635604576472531846174782. For example, the SEC's questioning of Groupon's accounting practices made headlines just months prior to Groupon's IPO. *Id.*

105. 15 U.S.C. § 77e(a)(1) (2012).

106. *Id.* § 77e(d) (2012).

will enable EGCs to discover whether there is a sufficient demand for their securities earlier in the IPO process.[107] It will also allow the issuer to provide important information to qualified investors about the issuer's business and proposed offering.[108]

Under the Exchange Act, research analysts that work for the banks participating in an IPO are restricted from publishing research reports about the issuer for a period of time after the IPO.[109] This rule was added to the Exchange Act as part of Sarbanes-Oxley to protect against conflicts of interest between banks' investment banking and research analyst services.[110] Title I of the JOBS Act has amended this rule to allow broker-dealers to publish research reports about EGCs even if that broker-dealer is participating in the registered offering of that EGC.[111] Research analysts from banks that are underwriting the IPO are now able to publish research on those companies without it constituting an "offer to sell."[112] Broker-dealers are also permitted to publish and distribute research reports following the IPO.[113] Finally, Title I prevents the SEC and SROs from restricting the arrangement of communication or the communication between management of an EGC and research analysts.[114]

107. IPO TASK FORCE, *supra* note 10, at 28–29.

108. *See id.* at 29. Removing communications restrictions will "allow companies to remove a significant amount of uncertainty regarding the feasibility of a successful IPO." *Id.*

109. 15 U.S.C. § 78o-6(a) (2012). The period of time that the research analysts are restricted from publishing research reports is set by the SEC, security exchanges, and securities associations. *Id.* Prior to the JOBS Act, the Financial Regulatory Authority imposed research quiet periods of 25–40 days immediately following an IPO for banks participating in the IPO as well as during the 15 days preceding the expiration of any lock-up agreement. FINRA Rule 2711.

110. *See* IPO TASK FORCE, *supra* note 10, at 26. The inherent conflicts of interest within large banks became highly publicized in 2002 when banks would offer to give favorable research reports in return for investment banking business. *See, e.g.*, Ben White, *Research Settlement Completed*, WASH. POST, Aug. 27, 2004, at E01, *available at* http://www.washingtonpost.com/wp-dyn/articles/A36995-2004Aug26.html. For example, Merrill Lynch & Co.'s analysts were publicly recommending stocks, but internal emails showed that analysts actually believed the stocks were "junk." *Id.* The banks responsible for wrongdoing ultimately settled with the New York Attorney General Eliot Sptizer for millions of dollars each. U.S. SEC. & EXCH. COMM'N, FACT SHEET ON GLOBAL ANALYST RESEARCH SETTLEMENTS (2003), *available at* http://www.sec.gov/news/speech/factsheet.htm.

111. 15 U.S.C. § 77b(a)(3) (2012).

112. *Id.*

113. 15 U.S.C. § 105(d). Prior to this amendment the Financial Industry Regulatory Authority—an SRO—required broker-dealers to wait up to 40 days after an IPO to publish reports about the issuing company if the broker-dealer participated in the issuance. FINRA Rule 2711(f)(1)–(2).

114. 15 U.S.C. § 78o-6 (c)(2012).

### *D. Other Changes Under Title I*

While most rule changes under Title I of the JOBS Act involve changing disclosure requirements and improving information available about EGCs, there are some other notable provisions of Title I. For example, the SEC must review Regulation S-K, which describes the reporting requirements for SEC filings of public companies, and update Regulation S-K if necessary.[115] Another potential change that the SEC must review is potentially increasing the "tick size" for the quotation of EGCs.[116] Tick size refers to the minimum price increment that can be used to trade a stock, and the current tick size for all stocks is one cent—also known as decimalization.[117] The IPO Task Force stated that decimalization has had an adverse impact on small IPOs by attracting short-term investors and decreasing the profit margins for the banks participating in the issuance.[118]

Title I required the SEC to conduct a study on whether a change in tick size for EGCs would be beneficial.[119] In July 2012, the SEC completed this study and, based on its findings, determined it would not change tick sizes because many investors worried that any benefits associated with changing tick sizes would not outweigh the potential problems associated with changing tick sizes.[120] However, the SEC did recommend further research into this potential change.[121]

Another notable aspect of Title I is its "à la carte approach."[122] Due to

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115. 15 U.S.C. § 108. The goal of this review is to see if the SEC can modernize and simplify its filing requirements for public companies. *Id.*

116. *See* 15 U.S.C. § 78k-1(c).

117. U.S. SEC. & EXCH. COMM'N., REPORT TO CONGRESS ON DECIMALIZATION 1 n.1 (2012), *available at* http://www.sec.gov/news/studies/2012/decimalization-072012.pdf [hereinafter DECIMALIZATION REPORT].

118. IPO TASK FORCE, *supra* note 10, at 13–14. Due to decimalization "investment banks now generate revenue primarily by executing a high volume of low-priced trades meant to capitalize on short-term changes in the price of highly liquid, very large-cap stocks." *Id.* at 13.

119. 15 U.S.C. § 78k-1(c)(6) (2012).

120. DECIMALIZATION REPORT, *supra* note 117, at 22–23. The SEC has preliminarily decided to not adjust the tick size but has recommended a roundtable discussion with market participants to address economic consequences of changing the tick size. *Id.*

121. *Id.*

122. ERNST & YOUNG, THE JOBS ACT: 18 MONTHS LATER 8 (2013), *available at* http://www.ey.com/publication/vwluassetsdld/jobsactupdate_cc0381_7november2013/$file/jobsactupdate_cc0381_7november2013.pdf?OpenElement. "À la carte approach" refers to an EGC's ability to pick and choose which Title I regulations it will follow. *See infra* notes 123–24 and accompanying text.

the permissive styling of many of Title I's provisions,[123] an EGC may pick and choose which Title I regulations it will follow and which normal regulations it will follow.[124] This approach was likely chosen because it encourages EGCs to adhere to normal regulations if they prefer, rather than forcing them to abide by all of the relaxed standards.[125] However, rather than creating one new category of issuer as the IPO Task Force intended,[126] this à la carte approach has produced numerous sub-categories of EGC issuers.[127]

## IV. TITLE I'S EFFECT ON INVESTOR PROTECTION

The goal of Title I is to jumpstart the struggling IPO market while not diminishing the power of investor protection measures already in place.[128] The IPO Task Force stated that scaled, temporary accounting standards and disclosures, along with relaxed communication regulations, would have this effect.[129] Yet, the IPO Task Force and House Report gave little attention to investor protection other than stating it will not be affected.[130] A closer analysis of the scaled deregulation indicates that Title I does have the

123. *See, e.g.*, 15 U.S.C. § 77g(a)(2) (stating that an EGC "need not present more than 2 years of audited financial statements").

124. ERNST & YOUNG, *supra* note 122, at 8. Most EGCs have chosen to take advantage of Title I's à la carte approach. For example 45% of EGCs have used scaled financial disclosure, yet 90% of EGCs have used scaled executive compensation disclosures. *Id.* Thus, assuming all EGCs that elected to use scaled financial disclosure *also* used scaled executive compensation disclosures, only 45% chose to use both. *Id.*

125. Congress intended to not affect investor protection, so it is reasonable to assume that they want to encourage EGCs to follow normal regulations if they wanted. *See generally* H.R. REP. NO. 112-406 (2012).

126. *See supra* notes 74–77 and accompanying text.

127. For example, there are two sub-category issuers due to the scaled financial disclosures provision: (1) EGCs with *two* years audited financial disclosures and (2) EGCs with *three* years of audited financial disclosures. *See supra* note 85. This approach also impacts how effectively Title I can improve the IPO market. *See infra* notes 210, 250 and accompanying text.

128. The JOBS Act "adapts the SEC's scaled regulations for smaller companies by more slowly phasing in regulations that impose high costs on issuers, without compromising core investor protections or disclosures." H.R. REP. NO. 112-406, at 6 (2012).

129. The IPO Task Force states that scaled disclosures will reduce the amount of time and money spent on going public and that the temporary nature of the relief maintains appropriate protection for investors. IPO TASK FORCE, *supra* note 10, at 11.

130. The IPO Task Force states that the On-Ramp will remain consistent with investor protection principles because the relaxed regulations are only temporary. *Id.* at 19; *see also infra* note 155.

potential to adversely affect investor protection.[131] However, market realities may ultimately minimize any ill effects.[132]

### *A. That "Small" Company Seems Pretty Big From Here*

One of the most interesting sections of Title I is the actual definition of an EGC because this definition controls which issuing companies will be allowed to use the EGC exemptions.[133] The restriction that an EGC must have less than a total of $1 billion dollars in revenue during its most recently completed fiscal year[134] is particularly surprising. The $1 billion dollar revenue cap for EGCs was presumably chosen so that EGC issuers would consist only of smaller, faster-growing companies.[135] However, it can be argued that the revenue cap is at odds with the intended definition of an EGC.[136]

The IPO Task Force originally proposed this $1 billion cap in the Task Force Report.[137] It recommended using this revenue-based test—rather than a market capitalization test or other benchmark—because the revenue-based test increased clarity and certainty regarding the applicability of Title I regulations.[138] The Task Force stated that, under the revenue-based test, only 15% of all public companies would be affected by the JOBS Act at any

131. *See infra* notes 133–88 and accompanying text.

132. *See infra* Part IV.D.

133. *See* 15 U.S.C. §§ 77b(a)(19) (2012), 78c(a)(80) (2012). An EGC is "an issuer that had total annual gross revenues of less than $1,000,000,000 . . . during its most recently completed fiscal year" unless a triggering event occurs. 15 U.S.C. § 77b(a)(19); *see also supra* notes 75–77 and accompanying text. The EGC definition alone does not compromise investor protections, but it allows many companies to qualify for Title I treatment, which exacerbates the issues created by scaled disclosure, relaxed accounting standards, and loosened communications regulations.

134. 15 U.S.C. §§ 77b(a)(19), 78c(a)(80) (2012).

135. The JOBS Act was introduced to the House of Representatives "[t]o encourage small companies to go public in the U.S." H.R. REP. NO 112-406, at 8. Because the purpose of the JOBS Act was to help small, fast-growing companies—not *all* companies—go public, the drafters likely only meant to include small companies in the definition of an EGC. *See* IPO TASK FORCE, *supra* note 10, at 1.

136. *See infra* notes 137–40 and accompanying text.

137. *See* IPO TASK FORCE, *supra* note 10, at 11, 19.

138. Market capitalization was not chosen because "in a volatile market, companies often have limited visibility of or control over their market cap[italization]." *Id.* at 11. Revenue is not considered the best way to value an investment in a company, but the Task Force wanted a straightforward test for determining which companies qualified for EGC treatment. *See id.*

time.[139] However, this statistic is misleading. From 2010 to 2012, approximately 89% of the companies that had IPOs would have qualified for EGC treatment, so, if this trend continues, the vast majority of companies going public in the future will be able to file as EGCs.[140] It is confusing that Title I provides relief for so many issuers when the goal was only to help small, fast-growing companies.[141] Title I essentially removes certain securities regulations for all IPOs—except for a few very large issuers.[142]

In addition to the revenue-based test contradicting the definition of an EGC,[143] the cap is also unnecessarily large when compared to the size of companies that have actually taken advantage of scaled financial disclosures.[144] Between April 2012 and April 2013,[145] the average revenue of EGCs reporting two years of financial data was approximately $60 million—far less than the $1 billion cap.[146] It is clear that larger EGCs are feeling the pressure from investors to file full financial disclosures.[147]

Thus, Title I could be improved by reducing the revenue cap.[148] This would create greater alignment between the revenue-based test and the

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139. *See id*. The IPO Task Force reached this number by analyzing the number of public companies from the past five years that would have qualified for EGC status. *Id*. It determined the number of issuers that would have qualified as EGCs and calculated this number as a percentage of all public companies for that given year. *Id*. at 42.

140. There were a total of 417 IPOs between 2010 and 2012, and 371 of these companies (88.9% of all IPOs) had revenues of less than $1 billion in the year prior to their IPO. ERNST & YOUNG, *supra* note 122, at 7.

141. The JOBS Act was introduced to the House of Representatives "[t]o encourage *small* companies to go public." H.R. REP. NO. 112-406, at 8 (2012) (emphasis added).

142. With such a high revenue cap, almost all companies going public can take advantage of Title I's scaled disclosures, relaxed accounting standards, and eased communications restrictions. *See supra* Part III.

143. *See supra* notes 137–42 and accompanying text.

144. EGCs that utilized the scaled financial disclosures "were significantly smaller in terms of revenue and total offering proceeds." ERNST & YOUNG, THE JOBS ACT: ONE-YEAR ANNIVERSARY 7 (2013), *available at* http://www.ey.com/Publication/vwLUAssets/The_JOBS_Act:_One-year_anniversary/$FILE/JOBSActAnniversary_CC0368_9April2013.pdf.

145. April 2012 to April 2013 was the first full year EGCs could utilize Title I. The amount of data on how EGCs are using Title I is restricted to this timeframe, so further research must determine whether these first-year trends continue. *But see infra* Part VII.

146. ERNST & YOUNG, *supra* note 122, at 7.

147. *Id*. Sixty-six percent of EGCs did not use the scaled financial disclosures. *Id*. These EGCs' average revenue was approximately $230 million—almost four times larger than the average EGC that filed scaled disclosures. *Id*.

148. *See infra* notes 149–52 and accompanying text.

definition of an EGC.[149] A lower revenue cap would also correspond with how the scaled financial disclosures are actually being used in practice because the market is compelling companies much smaller than $1 billion in revenue to use normal, full disclosures.[150] Finally, reducing the revenue cap would prevent larger companies—which are not taking advantage of financial disclosure relief[151]—from hiding other embarrassing information from investors.[152]

### B. *The Effect of Scaled Disclosures and Relaxed Accounting Standards on Investor Protection*

While the large revenue cap appears to be at odds with the definition of an EGC, the effectiveness of core provisions—scaled disclosures, relaxed accounting standards, and improved communications—will ultimately determine the success or failure of Title I.[153] The House Report on Title I of the JOBS Act explicitly states that Title I's scaled disclosures will not compromise investor protections.[154] However, that same report does little to address exactly what this means.[155]

To determine whether investor protection will be compromised, the potential harms must be analyzed in relation to the scaled disclosures and relaxed standards.[156] The four securities harms identified by Professor Guttentag are fraud, asymmetrical information, tunneling, and protecting investors from themselves.[157] The scaled disclosure and accounting requirements do not significantly affect previous measures taken to protect investors from insiders or themselves.[158] However, the relaxed regulations

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149. *See supra* notes 137–42 and accompanying text.

150. *See supra* notes 144–47 and accompanying text.

151. *See* ERNST & YOUNG, *supra* note 122, at 7. Assuming companies that believed they did not need the scaled financial disclosures in fact did not use them, 66% of EGCs did not need scaled financial disclosures, and these EGCs had greater revenue on average. *Id.*; *see supra* note 147.

152. ERNST & YOUNG, *supra* note 122, at 6. While only 34% of companies took advantage of the scaled financial disclosures, 81% of companies used scaled executive compensation disclosures. *See id.*

153. *See infra* notes 154–73, Part IV.C.

154. H.R. REP. NO. 112-406, at 6 (2012).

155. *See id.* The Report only refers to "investor protection" three times. *See id.* at 6, 8, 26.

156. *See infra* notes 157–88 and accompanying text.

157. Guttentag, *supra* note 30, at 222–30; *see supra* note 31 and accompanying text.

158. *Cf.* Guttentag, *supra* note 30, at 243. The scaled disclosure and accounting requirements do

will likely have an impact on fraud and asymmetrical information.[159]

Research on the occurrence of fraud during IPOs indicates that fraud is more likely to occur in fast-growing industries where investor optimism is high.[160] This finding is somewhat concerning because these are exactly the types of companies and industries that are most likely to benefit from Title I's scaled disclosures and relaxed accounting standards.[161] However, recent studies have not indicated a definitive connection between required disclosures and the likelihood of fraud.[162] Thus, it appears that while there is a greater risk of fraud with EGCs, there is no evidence that relaxing disclosure requirements will increase this risk.[163]

The investor harm most directly at risk due to Title I is information asymmetry.[164] Information asymmetry, in the investment context, refers to the fact that some investors—usually corporate insiders and financial professionals—may have greater access to information than other investors, which affects market fairness and increases the cost of capital for public

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not affect the protection of investors from firm insiders because no Title I provision restricts tunneling of firm assets or regulates conflict of interest transactions. *Cf. id.* (stating that reduced compensation disclosures and increased information asymmetry may lead to some tunneling issues but such problems are not greatly impacted). The scaled disclosure and accounting requirements also do not directly involve protecting investors from themselves because the JOBS Act does not restrict investors from making certain investments. *Cf. id.* at 242 ("To protect investors from making unwise investment decisions would probably involve implementing changes in our securities regulation regime that go well beyond the reductions in disclosure obligations temporarily provided to a select group of firms by the JOBS Act EGC provisions.").

159. *See infra* notes 160–73 and accompanying text.

160. *See* Tracy Yue Wang, Andrew Winton & Xiaoyun Yu, *Corporate Fraud and Business Conditions: Evidence from IPOs*, 65 J. OF FIN. 2255, 2269 (2010). Industries with high growth—such as computer software and pharmaceuticals—were among the industries most sued. *Id.*

161. The JOBS Act was created for young, fast-growing companies—the same types of companies that may be more likely to commit fraud. *Compare* ERNST & YOUNG, *supra* note 122, at 4, *with* Yue Wang, Winton & Xiaoyun, *supra* note 160, at 2269 (the computer software and pharmaceutical industries were among the most sued for alleged fraud).

162. *Compare* Michael D. Guttentag, Christine L. Porath & Samuel N. Fraidin, *Brandeis' Policeman: Results from a Laboratory Experiment on How to Prevent Corporate Fraud*, 5 J. EMPIRICAL LEGAL STUD. 244, 273 (2008) (concluding that requiring additional disclosures may decrease the likelihood that executives will commit fraud), *with* Daylian M. Cain, George Loewenstein & Don A. Moore, *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest*, 34 J. LEGAL STUD. 1, 22 (2005) (finding that requiring disclosures did not help protect against conflicts of interests).

163. *Cf.* Guttentag, *supra* note 30, at 238 ("[T]here is little or no evidence about the extent to which the temporary reduction in disclosure obligations provided to EGC firms will affect the probability of fraud occurring.").

164. *See infra* notes 165–72 and accompanying text.

companies.[165] Financial disclosures and independent auditing help alleviate the problems of information asymmetry by providing additional information to outside investors that they would not otherwise be able to access.[166] Strong accounting standards increase the truthfulness and consistency in which this financial information is reported.[167] Title I reduces the amount of financial information that EGCs must report and exempts them from some accounting standards.[168] This creates the potential for greater information asymmetry between corporate insiders and outside investors.[169] EGC executives and investment bankers may have many years of financial information about the EGC, but EGC issuers are only required to publicly report two years of financial information when filing with the SEC.[170]

Title I's accounting transition period also temporarily exempts EGCs from accounting rule changes.[171] This transition period creates information asymmetry because corporate insiders will know the effect of pending accounting changes long before the investing public.[172] Finally, the problem of information asymmetry is compounded by the fact that banking professionals and institutional investors will have greater access to information under the relaxed communication rules.[173] Thus, in theory, Title

165. *See* LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 101 (1914). Brandeis states that disclosure rules encourage bankers and insiders to disclose the risks of an investment that a small investor must know in order to judge the safety of an investment. *Id.* at 101–05. In markets where company insiders may trade based on non-public information, the cost of capital is higher than in markets that do not. Guttentag, *supra* note 30, at 239.

166. S.P. Kothari, *The Role of Financial Reporting in Reducing Financial Risk in the Market*, 44 FED. RESERVE BANK OF BOS. CONF. SERIES 89, 92 (2000), *available at* http://www.bostonfed.org/economic/conf/conf44/cf44_6.pdf ("[T]heoretical literature shows that both mandated and voluntary disclosures reduce information asymmetries among informed and uninformed market participants.").

167. The use of independent, public accountants to certify financial documents as well as oversight by regulatory organizations—such as the SEC and PCAOB—is believed to increase the reliability of financial reporting. *See, e.g.*, H.R. REP. NO. 107-414, at 16 (stating that Sarbanes-Oxley "will protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws").

168. *See supra* Part III.B.

169. *See infra* notes 170–72 and accompanying text.

170. 15 U.S.C. § 77g(a)(2) (2012) (stating that an EGC "need not present more than 2 years of audited financial statements").

171. 15 U.S.C. § 7213(a)(3)(C).

172. EGC status may last up to five years. *See supra* note 76 and accompanying text. Thus, an accounting rule change during the first year a particular EGC is public may not be projected on that EGC's annual financial statements for over four years. By contrast, the same rule change would appear on a non-EGC companies financial statements within a year.

173. *See infra* notes 181–87 and accompanying text.

I's scaled disclosures and relaxed accounting standards will have an impact on investor protection, especially on fraud and asymmetrical information.

### C. *The Effect of Relaxed Communication Regulations on Investor Protection*

The relaxation of communication regulations may also have a negative impact on protecting investors from themselves, fraud, and information asymmetry.[174] The primary goal of regulations that protect investors from themselves is shielding against over-excitement and irrational decision-making by investors.[175] Title I creates an additional opportunity for an issuer to generate excitement about its offering because it reduces the barriers for communication between issuers and investors at an earlier stage of the IPO process.[176] However, the relaxed testing-the-waters restrictions only apply to qualified institutional investors—not the small, unsophisticated investors that the securities regulations are designed to protect.[177]

Relaxed communication standards also create a risk of fraud because they provide issuers with more opportunities to communicate with potential investors in a less regulated environment.[178] An even greater risk of fraud may come from the relaxation of communication restrictions involving research analysts and the banks underwriting the IPO.[179] Allowing underwriters to publish research presents a conflict of interest—the bank can sell a security and publish "independent" research about it at the same time—and supersedes the efforts of the SEC, the Financial Regulatory Authority (FINRA), and other SROs to protect investors from these conflicts.[180]

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174. Similar to the minimal effect of scaled disclosures, tunneling also will not be greatly impacted by Title I because Title I does not restrict tunneling of firm assets and does not regulate conflict of interest transactions. *See supra note* 158.

175. *See, e.g.*, 15 U.S.C. § 77h(a) (2012) (requiring a twenty-day waiting period between the registration of an IPO and the sale of the security).

176. *See id*. § 77e(d); *see also supra* notes 106–08 and accompanying text.

177. *See* 15 U.S.C. § 77e(d).

178. *See id*.

179. 15 U.S.C. § 78o-6(a) (2012); *see supra* notes 109–14 and accompanying text.

180. The SEC and FINRA had adopted rules imposing quiet periods on research, but, in 2012, the SEC approved amendments to NASD (the predecessor to FINRA) Rule 2711 and incorporated New York Stock Exchange Rule 472 to conform to the JOBS Act amendments. *See* FINRA REGULATORY NOTICE 12-49, *available at* http://www.finra.org/web/groups/industry/@ip/@reg/@no

Finally, relaxed communication restrictions may create information asymmetries because institutional investors are now permitted to communicate with EGCs more often and earlier in the IPO process.[181] Bankers and institutional investors already have an informational advantage in the market.[182] This informational gap between small investors and institutional investors will grow even larger due to greater communication between EGC issuers and these sophisticated investors.[183] This information asymmetry will also be exacerbated by the asymmetries created by the scaled disclosures.[184]

The potential for information asymmetry created by confidential SEC registration filings also has commentators particularly worried.[185] In the past, publicly filing registration statements provided the investing public with information about accounting problems with new issuers—for example, Groupon's IPO in 2011.[186] Confidential filings will allow EGCs to fix these problems without public scrutiny.[187] Thus, an abstract analysis of Title I's core provisions demonstrates that the JOBS Act does have the potential to create a greater risk of fraud, asymmetrical information, and to a lesser extent, overexcitement.[188]

### D. *Is Title I's Impact on Investor Protection Overstated?*

Though Title I appears to weaken investor protections in theory, the practices and realities of the financial markets may negate any ill effects.[189] An increased risk of fraud seems to be negated by multiple factors.[190] First,

tice/documents/industry/p196168.pdf.

181. 15 U.S.C. § 77e(d); *see also supra* notes 105–08 and accompanying text.

182. Because of investment bankers' vital role as monetary intermediaries, they possess greater amounts of information and power than the average investor. *See* BRANDEIS, *supra* note 165, at 4–6.

183. These institutional investors will now have information about an EGC issuer before many smaller investors will even know the EGC is planning to register for an IPO because testing the water may occur before the EGC files with the SEC. *See* 15 U.S.C. § 77e(d) (2012).

184. *See supra* notes 168–72 and accompanying text.

185. *See supra* note 19.

186. Groupon created its own accounting metric that became public after filing its registration statement with the SEC. Raice & Wingfield, *supra* note 104. The SEC's disapproval of the metric became headline news months prior to Groupon's IPO. *See id.*

187. 15 U.S.C. §§ 78o-6(a) (2012), 77b(a)(3).

188. *See supra* notes 158–87 and accompanying text.

189. *See infra* notes 191–95 and accompanying text.

190. *See infra* notes 191–95 and accompanying text. It is not clear if the risk of fraud is increased

the sections of Sarbanes-Oxley that were designed to combat corporate fraud—such as imposing criminal liability on executives—remain intact with the JOBS Act.[191] Further, bankers have been hesitant to publish research reports about the EGCs they have represented because Title I does not provide a safe harbor and does not change restrictions for banks that participated in the Global Settlement.[192]

The actual creation of information asymmetry may also be overstated because the majority of EGCs chose to use full financial disclosures.[193] Between April 2012 and April 2013, 66% of companies chose to file three years of audited financial statements in spite of Title I.[194] It is also difficult to imagine how one additional year of financial information could drastically enhance insiders' advantage because insider trading laws are not affected by the JOBS Act.[195] Finally, the effect of confidential filings may be overstated because IPO registration statements—and any previously confidential registration statements—will become public twenty-one days prior to an EGC's roadshow.[196] Thus, while minimizing disclosures, relaxing accounting standards, and reducing communication restrictions may appear to compromise investor protection on paper, the negative impact has been overestimated by investor advocates in light of the realities of a competitive financial market.[197]

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by scaled disclosures. *See supra* notes 162–63 and accompanying text.

191. Section 906 of Sarbanes-Oxley requires a top executive to certify that the financial reports comply with the Exchange Act, and, if such documents do not comply, the officer is subject to criminal penalties. 15 U.S.C. § 78m (2012); 18 U.S.C. § 1350 (2012).

192. *See* 15 U.S.C. § 77e(d); U.S. SEC. & EXCH. COMM'N, DIV. OF TRADING & MKTS., JUMPSTART OUR BUSINESS STARTUPS ACT FREQUENTLY ASKED QUESTIONS ABOUT RESEARCH ANALYSTS AND UNDERWRITERS (2012) [hereinafter FREQUENTLY ASKED QUESTIONS], *available at* http://www.sec.gov/divisions/marketreg/tmjobsact-researchanalystsfaq.htm; *see also supra* notes 105–08 and accompanying text.

193. *See supra* note 147 and accompanying text. While EGCs may disclose no less than two years of financial statements, there is no restriction on producing more than two years. *See* 15 U.S.C. § 77g(a)(2).

194. ERNST & YOUNG, *supra* note 122, at 6.

195. *See* 15 U.S.C. §§ 78u-1, 78j (2012). Thus, while insiders may have more information, they will still not be able to legally use that information to affect the market in an unfair way.

196. *Id.* §§ 78o-6(a), 77b(a)(3); *see also* Dan Primack, *Twitter's IPO Will Not Be Done in Secret*, FORTUNE MAG., Sept. 17, 2013, 2:43 PM, http://finance.fortune.cnn.com/2013/09/17/twitters-ipo-will-not-be-done-in-secret/.

197. In addition to not affecting fraud and information asymmetry protections, Title I does not appear to have affected protecting investors from themselves. As stated above, the regulatory goal of protecting investors from themselves does not generally apply to the sophisticated institutional

## V. TITLE I'S EFFECT ON THE IPO MARKET

So long as investor protection is not compromised, the final test for Title I will be how it helps revive the IPO market.[198] Title I's scaled disclosure requirements and relaxed accounting standards are intended to (1) increase the amount of EGCs going public by reducing costs[199] and (2) encourage smaller companies to go public earlier.[200] In addition to these two objectives, the relaxed communication standards were added to improve the amount of information available about EGCs.[201] Though critics have been quick to point out the JOBS Act's potentially adverse effect on investor protection,[202] there has been less discussion over Title I's ability to meet these three goals.[203]

### *A. Scaled Disclosures and Relaxed Accounting Standards May Reduce Costs for EGCs, But . . .*

By creating the JOBS Act, Congress trusted that Title I's scaled financial disclosures and relaxed accounting standards would help EGCs reduce the cost of going and staying public.[204] This theory rests on the logical assumption that, by reducing the amount of required disclosures, Title I reduces the amount of time and money spent on legal and

investors that will be allowed to communicate earlier with EGC issuers. *See supra* note 177 and accompanying text.

198. Reviving the IPO market to create jobs is the express purpose of Title I. *See* H.R. REP. NO. 112–406, at 6 (2012).

199. Title I adopts "scaled regulations for smaller companies by more slowly phasing in regulations that impose high costs on issuers." *Id.*

200. Title I "provides temporary regulatory relief to small companies, which encourages them to go public." *Id.*

201. Title I "improves the flow of information about EGCs to investors by removing burdensome and outdated restrictions on communications between companies, research analysts, and investors." *Id.*

202. *See supra* notes 5, 19 and accompanying text.

203. Some critics have questioned the JOBS Act's effectiveness. *See, e.g.*, Steven D. Solomon, *A Year Later, the Missed Opportunity of the JOBS Act*, N.Y. TIMES DEALBOOK (June 11, 2013, 5:19 PM), http://dealbook.nytimes.com/2013/06/11/a-year-later-the-missed-opportunity-of-the-jobs-act/?_php=true&_type=blogs&_r=0. Solomon argues that the JOBS Act has done little to help revive the IPO market and states that IPOs are spurred by factors such as "a robust stock market and a reviving economy in addition to a growth story that investors want[] to buy." *Id.*

204. Title I will provide regulatory relief that encourages EGCs to go public. H.R. REP. NO. 112–406, at 6 (2012).

independent accounting services—the two largest expenses for companies going public.[205] Scaled disclosures should also help reduce the administrative costs of auditing and the amount of time that executives and employees must spend on auditing.[206]

In essence, Congress concluded that fewer disclosures and relaxed accounting standards would translate into less time spent preparing IPO documentation, and thus, less money would be spent during the IPO process.[207] While logically sound, there is currently no research or data to support that conclusion.[208] It is too early to accurately compute how much Title I will save EGCs, and the public will likely have to wait years before credible data about its cost-saving measures is available.[209]

Even assuming the expense of going and staying public is reduced by Title I's scaled disclosures and relaxed accounting standards, the JOBS Act's à la carte approach may ultimately negate this benefit.[210] In Title I's first year, the majority of EGCs chose to disclose three years of audited

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205. According to PwC, the average cost of legal services and external accounting services related to an IPO was $4.1 million for companies with revenue between $500 million and $1 billion. PRICEWATERHOUSECOOPERS' DEALS PRACTICE, *supra* note 37, at 8.

206. The time spent by executives and employees on auditing is particularly costly because this could have been time spent growing the business. In a survey of CEOs for public companies, the IPO Task Force found that the two most significant IPO challenges were the administrative burden of public reporting and the reallocation of the CEO's time to report and compliance versus company building. IPO TASK FORCE, *supra* note 10, at 38.

207. *See* H.R. REP. NO. 112-406, at 6 (2012). The scaled disclosures are meant to reduce the burden of high compliance costs, and relaxed accounting standards are meant to allow EGCs to avoid unnecessary costs. *Id*.

208. There is a lack of data on how scaled disclosures reduce costs because the scaled disclosures have only been in place for less than two years. However, there is a large amount of research on the cost of going public under the previous requirements. *See, e.g.*, PRICEWATERHOUSECOOPERS' DEALS PRACTICE, *supra* note 37, at 7. One way to determine if scaled disclosures will save costs is to study how the enactment of Sarbanes-Oxley increased the cost of going and staying public. Because Title I is removing some of the Sarbanes-Oxley requirements, Title I is likely to remove some of the costs of it as well. A survey done in 2003 and 2004 (the years immediately before and after the enactment of the Sarbanes-Oxley Act) showed that the cost of compliance increased from $1.3 million to $2.9 million. Lynn Stephens & Robert G. Schwartz, *The Chilling Effect of Sarbanes-Oxley: Myth or Reality?*, CPA JOURNAL 17 (June 2006), *available at* http://www.nysscpa.org/cpajournal/2006/606/infocus/p14.htm.

209. After a few years, there should be a large enough sample size to draw statistical conclusions. For example, while Sarbanes-Oxley was enacted in 2003, most studies about the cost of compliance were released multiple years later. *See, e.g.*, Stephens & Schwartz, *supra* note 208, at 17.

210. *See supra* note 122 (noting that many EGCs are not taking advantage of scaled financial disclosures because they can choose not to follow them.).

information (66%) and used normal accounting standards (79%).[211] Further, companies that did produce two years of financial information generally performed worse in the stock market on their first day.[212] These trends indicate that although EGCs are no longer required by law to produce three years of audited financial information, investors still demand that companies produce such information,[213] and EGCs that choose to disclose two years of financial information may suffer lower market gains as a result.[214] The only scaled disclosure adopted by a majority of EGCs is the scaled executive compensation disclosure.[215] This disclosure was not even targeted at reducing costs but was added to encourage executives to take their companies public.[216]

Assuming—optimistically—that Title I is effective at reducing regulatory compliance costs for EGCs, the JOBS Act may still fail to deliver on the promise of an improved IPO market because cost is only one of many factors that has affected the market.[217] In fact, increased regulatory compliance costs may have only been a very small factor in the demise of the IPO market.[218] The decline in small IPOs actually began between 1996 and 2000—well before Sarbanes-Oxley was enacted in late 2002.[219] Market events such as the advent of online brokerage accounts,[220] new SEC order

211. ERNST & YOUNG, *supra* note 122, at 6. Only 34% of EGCs used the scaled disclosures, and 21% used the relaxed accounting standards. *Id.*

212. *Id.* at 7.

213. EGCs that chose to publish two years of financial information were generally smaller in terms of revenue and offering proceeds. *Id.* at 6. This suggests that larger EGC issuers believe they must produce three years of financial information in order to compete with their non-EGC competitors.

214. *Id.*

215. LATHAM & WATKINS, THE JOBS ACT AFTER ONE YEAR: A REVIEW OF THE NEW IPO PLAYBOOK 12 (2013), *available at* http://www.sec.gov/info/smallbus/acsec/acsec-091713-lathamreport-slides.pdf. Approximately 75% of EGCs used streamlined executive compensation disclosures. *Id.*

216. *See infra* notes 237–39 and accompanying text.

217. The IPO Task Force has identified other contributing factors such as market conditions, decimalization, and electronic trading. IPO TASK FORCE, *supra* note 10, at 9; *see also supra* note 8.

218. In 2010, Weild and Kim described the costs of Sarbanes-Oxley as "a bit of a red herring in that it is only one factor, and probably not the major factor, in the demise of the IPO market." WEILD & KIM, *supra* note 6, at 5.

219. Small IPOs—those raising under $50 million—fell from approximately 600 in 1996 to approximately 100 in 2000. *Id.*

220. Charles Schwab launched its online service in 1996, making it the first online brokerage firm. *About Schwab*, CHARLES SCHWAB, http://www.aboutschwab.com/about/timeline/schwab_history

handling rules,[221] and decimalization also occurred during this time.[222] These events lowered transaction costs for individual investors and decreased the profitability for the banks underwriting IPOs, which destabilized the financial market for smaller IPOs.[223]

Others researchers, such as Professor Jay R. Ritter, contend that the decline of small IPOs is due to the decreased profitability of small companies.[224] Professor Ritter suggests that, because small public companies are struggling to become profitable, fewer small companies have gone public and have alternatively chosen to be acquired by large companies.[225] These alternative theories about the IPO market's demise indicate that regulatory burdens may not have been a huge factor in the decline.[226] If the cost of going and staying public did not cause the decline in IPOs, merely reducing these expenses will not help revive it.[227]

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(last visited Jan. 21, 2014).

221. In 1997, the SEC created new order handling rules to increase competition between various stock markets. *See* 17 CFR § 240.11Ac1-4; *see also* Elizabeth R. Odders-White, *Third Market Reforms: The Overlooked Goal of the SEC's Order Handling Rules*, 39 J. OF FIN. & QUANTITATIVE ANALYSIS 277 (2004); *S.E.C. Delays New Order Handling Rules,* N.Y. TIMES, Jan. 3, 1997, *available at* http://www.nytimes.com/1997/01/03/business/sec-delays-new-order-handling-rules.html.

222. The New York Stock Exchange converted all of its prices to decimals on January 29, 2001. Thomas S. Mulligan, *NYSE, AMEX Will Shift All Stocks to Decimal Prices on Monday*, L.A. TIMES, Jan. 26, 2001, http://articles.latimes.com/2001/jan/26/business/fi-17207.

223. *See* WEILD & KIM, *supra* note 6, at 11. Transaction costs were lowered dramatically during this time period because online brokerages reduced commission fees, the order handling rules created a more competitive exchange market, and decimalization lowered spreads (the asking price difference between buyers and sellers of a security). *Id.* With lower transaction costs, individual traders made the market less suitable for small IPOs because the markets became more volatile and individual traders shied away from risky IPOs. *Id.* at 11–12.

224. "[T]he percentage of firms reporting negative profits three years after IPO has increased from an average of 58% in 1980–2000 to 73% in 2001–2009." Xiaohui Gao, Jay R. Ritter & Zhongyan Zhu, Where Have All the IPOs Gone? 29 (Apr. 3, 2012) (unpublished manuscript) (on file with the Fisher College of Business), *available at* http://fisher.osu.edu/supplements/10/12092/Where%20Have_April_3_2012.pdf.

225. Small companies are now looking to be acquired by larger companies so that they can bring products to market quicker through realizing economics of scale and scope. *Id.*

226. Most studies indicate that it was likely a combination of *many* factors. WEILD & KIM, *supra* note 6, at 5; Xiaohui, Ritter & Zhongyan, *supra* note 224, at 29 ("We do not dispute that the 2002 Sarbanes-Oxley Act and the 2003 Global Settlement have reduced the attractiveness of being public for small companies.").

227. Based on their findings, Professor Ritter and his colleagues concluded that the JOBS Act is likely to have little effect on the IPO market. Xiaohui, Ritter & Zhongyan, *supra* note 224, at 30; *see also* Stephens & Schwartz, *supra* note 208, at 18 ("[T]he evidence to date that [the Sarbanes-

Thus, Title I has the potential to reduce the cost of going and staying public for smaller companies, but a majority of EGCs seem unwilling to take advantage of this due to investors' preference for full financial disclosures.[228] Further, even successful cost reductions may be ineffective at helping revive the IPO market.[229] To provide greater stimulus for the IPO market, Congress should investigate ways to minimize the effect of market changes[230] and increase the profitability of small public companies.[231]

### B. *The Effect of Title I's Encouragement on the IPO Market*

Title I was not created solely for the purpose of reducing the cost of going and staying public for EGCs; it was also meant to "encourage" EGCs to go public earlier.[232] Title I encourages EGCs to go public through the use of scaled disclosures,[233] the confidential registration process,[234] and improved communication with investors.[235]

The scaled disclosures and relaxed accounting standards might not be as successful as Congress had envisioned considering Title I's apparent failures at reducing costs,[236] but some of the scaled disclosures—particularly reduced executive compensation disclosures—may still entice small companies to go public.[237] In fact, the scaled executive compensation disclosures have been one of the most used Title I provisions.[238] This is because these provisions

Oxley Act] is sufficient cause for companies to stay private has been largely anecdotal or limited in scale.").

228. *See supra* notes 210–16 and accompanying text.

229. *See supra* notes 217–27 and accompanying text.

230. These market changes—primarily driven by increased competition—have benefited consumers by reducing costs and creating more accessible markets, so Congress should proceed cautiously with any changes. *See supra* notes 220–22 and accompanying text. Congress did attempt to fix decimalization for EGCs. *See* Jumpstart Our Business Startups (JOBS) Act Pub. L. No. 112–106, § 106(b), 126 Stat. 306 (2012) (codified at 15 U.S.C. §§ 77–78 (2012)).

231. *But cf.* Xiaohui, Ritter & Zhongyan, *supra* note 224, at 30 ("[E]ncouraging small firms to remain independent rather than realize greater value as part of a larger organization might harm the economy.").

232. *See* H.R. REP. NO. 112-406, at 6 (2012).

233. *See infra* notes 237–39 and accompanying text.

234. *See infra* notes 240–44 and accompanying text.

235. *See infra* notes 245–47 and accompanying text.

236. *See supra* Parts IV.B, V.A.

237. *See* 15 U.S.C. § 78n-1(b) (2012); *see also supra* notes 92–93 and accompanying text.

238. According to Ernst and Young, 82% of the EGCs used Title I's scaled executive disclosures in the first year. ERNST & YOUNG, *supra* note 122, at 6.

allow executives to take their companies public without having to worry about scrutiny of their compensation practices.[239]

Another encouragement provision that has been very popular is the confidential registration process.[240] This section of Title I encourages companies to go public in two ways.[241] First, it offers small companies the peace of mind that they can resolve any accounting issues with the SEC prior to publicly filing their registration documents.[242] Second, confidential filings protect important financial and organizational information from competitors while a company prepares for its IPO.[243] EGC executives value privacy, and confidential filings allow EGCs to keep that sense of privacy for a little longer than non-EGC issuers.[244]

The final encouragement provision, increased communication with investors, is designed to allow EGCs to better evaluate whether there is enough demand for their offering.[245] A lackluster IPO can create a lot of negative press for an issuer; so, many companies delay their offering until

239. EGCs will not have to hold a non-binding vote on executive compensation or disclose the ratio that compares the CEO's compensation to that of median employees. 15 U.S.C. § 78n-1(b). Critics of the compensation ratio state that the numbers of such a ratio can be skewed based on workforce factors such as industry type, number of part-time employees, and outsourcing. *See, e.g.*, Scott Thrum, *It's Hard to Slice and Dice CEO Paychecks*, WALL ST. J., Sept. 20, 2013, 7:23 PM, http://online.wsj.com/news/articles/SB10001424127887324807704579087303537495372.

240. *See* 15 U.S.C. § 77f(e). Approximately two thirds of EGCs between April 2012 and April 2013 filed confidentially with the SEC prior to publicly filing the registration statements. ERNST & YOUNG, *supra* note 122, at 6.

241. *See infra* notes 242–43 and accompanying text.

242. Prior to the JOBS Act, all U.S. companies had to file publicly with the SEC. 15 U.S.C. § 77f. This release of information has been a disaster for some companies such as Groupon, whose valuation eroded before its IPO from $25 million to about $10 million after the SEC questioned its accounting practices. Michelle Conlin, *Groupon is a Disaster*, BUS. INSIDER (Oct. 21, 2011, 4:45 PM), http://www.businessinsider.com/groupons-fall-to-earth-swifter-than-its-fast-rise-2011-10; Raice & Wingfield, *supra* note 104.

243. Financial statements reveal more about a company than mere financial numbers. *See* Mary Ellen Biery, *What Are Your Financial Statements Telling You?*, FORBES, Dec. 22, 2013, 6:54 AM, http://www.forbes.com/sites/sageworks/2013/12/22/understanding-financial-statements/. Many companies—especially in new or growth industries—are hesitant to go public because of the amount of information they will have to release. *Cf.* IPO TASK FORCE, *supra* note 10, at 29 (noting that confidential review will allow EGCs to initiate the IPO process "without immediately disclosing competitively sensitive or otherwise confidential information").

244. Confidential filing only remains private until 21 days prior to the EGC's roadshow. 15 U.S.C. § 77f(e) (2012).

245. 15 U.S.C. § 77e(d); *see also supra* notes 106–07 and accompanying text.

they are confident that there will not be any problems.[246] Allowing EGCs to gauge investor interest should help alleviate the fear of a failed offering and encourage more companies to consider an IPO.[247]

Thus, Title I does offer regulatory relief that encourages EGCs to go public earlier, and EGCs are taking advantage of this relief.[248] However, it is not clear if Title I is actually causing these companies to go public earlier.[249] Financial commentators suggest that Title I's à la carte approach is merely allowing companies that would have gone public regardless of the JOBS Act to take advantage of benefits they do not need.[250] Alternatively, the selective use of certain provisions may indicate that, while investors do value full financial disclosures,[251] they do not value executive compensation disclosures at the time of IPOs.[252]

At this time, there is not enough data to make an accurate conclusion about the effectiveness of these provisions; so, Congress should commission research to determine if Title I is actually encouraging EGCs to go public.[253] If the research determines that it is not, removing Title I's à la carte approach may prevent EGCs from misusing scaled disclosures when they do

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246. For example, Facebook's stock lost value in the months following its IPO due to mispricing and a stock exchange glitch, which led to lawsuits and bad press for over a year. *See, e.g.*, Khadeeja Safdar, *Facebook, One Year Later: What Really Happened in the Biggest IPO Flop Ever*, ATLANTIC, May 20, 2013, http://www.theatlantic.com/business/archive/2013/05/facebook-one-year-later-what-really-happened-in-the-biggest-ipo-flop-ever/275987/.

247. IPO TASK FORCE, *supra* note 10, at 28–29. Allowing EGCs to communicate with potential investors will help companies evaluate the interest in their potential offering and gather information about how much could be raised. *Id.*; *see* 15 U.S.C. § 77e(d).

248. *See supra* notes 232–47 and accompanying text.

249. While there is strong data to show that EGCs take advantage of the executive compensation provision, there is no evidence that it has influenced EGCs to go public. *See* ERNST & YOUNG, *supra* note 122, at 6. Research has not indicated that executive compensation disclosures are discouraging companies from going public. *Cf.* IPO TASK FORCE, *supra* note 10, at 38 (observing that "executive compensation disclosure" was not a top response to questions regarding "concerns about going public" and "most significant IPO challenges").

250. *See, e.g.*, Solomon, *supra* note 203 ("[One EGC's recent] selective use of the JOBS Act shows that it is being used to avoid disclosure of information that may cause embarrassment to the company or alert investors of problems.").

251. *See supra* notes 213–14 and accompanying text.

252. Investors do not appear to have pressured EGCs to publish executive compensation because 90% of EGCs used the scaled executive disclosures. *See* ERNST & YOUNG, *supra* note 122, at 8.

253. Surveys of EGC executives that recently took their company public may shed light on Title I's encouragement in the same way that the IPO Task Force surveyed CEOs prior to the JOBS Act. *See* IPO TASK FORCE, *supra* note 10, at 38.

not need them.[254]

### *C. The Effect of Title I's Relaxed Communication Regulations on the IPO Market*

Title I's final stated goal is to improve the amount and flow of information available about EGCs.[255] Title I utilizes three mechanisms to accomplish this goal: confidential registration filings, relaxed testing-the-waters restrictions, and reduced regulation of analyst communications.[256] The first provision, allowing EGCs to confidentially file their SEC registration, actually reduces the amount of information available in the marketplace.[257] However, this restriction of information is remedied when an EGC must publicly file twenty-one days prior to its roadshow,[258] and the confidential registration provision's potential to encourage EGCs to go public may outweigh this delay in the flow of information.[259]

In spite of confidential filings, Title I promises to provide greater amounts of information to certain investors by allowing EGCs to communicate with qualified institutional buyers and other accredited institutional investors before and after the EGC files a registration statement with the SEC.[260] Also, reducing the regulation of analyst communications creates the potential for an increased flow of information to all investors.[261]

254. If Title I was changed to an all-or-nothing approach, a company that merely wanted to hide its executive compensation would also have to disclose two years of financial information, which investors have punished. *See supra* notes 213–14 and accompanying text.

255. Title I "also improves the flow of information about EGCs to investors by removing burdensome and outdated restrictions on communications between companies, research analysts, and investors." H.R. REP. NO. 112-406, at 6 (2012).

256. *See supra* Part III.C.

257. By allowing companies to register with the SEC confidentially, potential damaging information about the company is not immediately available to the public. *See supra* notes 186–87 and accompanying text.

258. *See supra* note 196 and accompanying text.

259. *See* Primack, *supra* note 196; Berlau, *supra* note 20 (stating that, due to Title I, Twitter went public at an earlier stage of growth, which offers greater opportunities for investors to share in the growth of the company).

260. 15 U.S.C. § 77e(a)(1) (2012); *see also supra* notes 106–08 and accompanying text.

261. These provisions allow analysts to communicate with an EGC's management to gather more information about the offering, which should enhance an analyst's ability to discuss the offering with prospective investors. *See* Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112–106 § 105(a), 126 Stat. 306 (2012); 15 U.S.C. § 78o-6(a) (2012); *see also* notes 109–14 and accompanying text. Section 105 also allows research reports to be published prior to the EGC IPO. JOBS Act

However, just as market realities minimize Title I's impact on investor protection, they may also diminish Title I's effect on the IPO market.[262]

The relaxation of testing-the-waters restrictions is a large departure from the communication standards under Section 5 of the Securities Act and greatly improves the amount of information an EGC can share with potential investors prior to the IPO.[263] However, this provision only benefits large, sophisticated investors.[264] Further, even this new stream of information to the institutional investors is constrained due to the SEC's oversight of EGCs' testing-the-waters communications.[265]

Title I's relaxed analyst regulations have also been ineffective because banks have been hesitant to publish any research beyond their normal practices.[266] Title I does not provide a safe harbor from Exchange Act liability for research reports[267] and does not remove any of the Global Settlement restrictions for the banks involved in that agreement.[268] These hurdles have caused banks to maintain the status quo.[269] After the JOBS Act's first year, a study could not identify a single research report published prior to an EGC IPO.[270] Also, many underwriting banks have contractually agreed to research quiet periods in spite of Title I removing these restrictions.[271]

Finally, the conflicting goals of Title I may further slow the flow of, and

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§ 105(a).

262. *Compare* Part IV.B, *with* notes 264–71 and accompanying text.

263. 15 U.S.C. § 77e(d); *see also supra* note 106 and accompanying text.

264. *Compare* 15 U.S.C. § 77e(a), *with* 15 U.S.C. § 77e(d).

265. The SEC has focused on testing-the-waters communications and frequently requests to review these materials. LATHAM & WATKINS, *supra* note 215, at 6.

266. *See, e.g.*, Soyoung Kim & Olivia Oran, *Analysis: JOBS Act Has Wall Street Worried About Conflicts*, REUTERS, Apr. 11, 2012, 12:44 PM, http://www.reuters.com/article/2012/04/11/us-jobsact-ipos-idUSBRE83A0Z820120411 ("Lawyers and bankers at major Wall Street firms are worrying that provisions in the newly passed Jobs Act will compromise the independence of their research and leave them open to investor lawsuits . . . .").

267. *See* 15 U.S.C. § 77e(d); LATHAM & WATKINS, *supra* note 215, at 14; *see also supra* notes 105–08 and accompanying text.

268. *See* 15 U.S.C. § 77e(d); FREQUENTLY ASKED QUESTIONS, *supra* note 192.

269. *See infra* notes 270–71 and accompanying text.

270. *See* LATHAM & WATKINS, *supra* note 215, at 15. "To date, we are not aware of any pre-deal research reports published by participating broker-dealers in reliance on the new exception for EGC research reports added by Section 105(a) of the JOBS Act." *Id.*

271. *Id.* at 16. Many lead underwriters are imposing contractual quiet periods on the underwriting syndicate, which typically last 25 calendar days. *Id.*

limit the amount of, information available about EGCs. Congress wanted to allow an EGC to report less information and, at the same time, increase the availability of information on that company.[272] Such contradictory objectives encapsulate how Congress has struggled to create an effective cure to the IPO market's decline. Each provision of Title I has the potential to improve the IPO market when contemplated by itself, but when considered with other provisions and goals, each provision's effect is less salient.[273] This failure to view the problem in a more holistic manner has resulted in legislation that has had, thus far, minimal impact on the IPO market.[274]

## VI. CONCLUSION: ONE STEP CLOSER

There is no question that the IPO market is in need of help and is worth rescuing: the IPO market is in the midst of a crisis that has transcended the financial struggles of the past decade and a half, and job growth is essential to helping the entire U.S. economy complete its recovery.[275] For these reasons, the JOBS Act's scaled deregulations are a step in the right direction, and Congress deserves praise for taking that step. However, Title I has not resolved many of the issues it set out to remedy and has fallen short of its promises.[276] Investor protection has largely remained intact,[277] but the JOBS Act has not yet met its goal of stimulating the IPO market.[278] Many of the problems—such as investor preferences and changing economics—are beyond the reach of Congress's power, but other issues are not. Congress should commission more research about the effectiveness of Title I and improve the sections that have not reached their full potential. The IPO market still needs help, and these two additional steps could provide just that.

272. *Compare supra* Part III.B, *with supra* Part III.C.
273. *See supra* Parts IV.D, V.
274. ERNST & YOUNG, *supra* note 144, at 3; *see also* ERNST & YOUNG, *supra* note 122, at 8.
275. *See supra* notes 6–15 and accompanying text.
276. *See supra* Part V.
277. *See supra* Part IV.
278. *See supra* note 274.

## VII. MARKET UPDATE: THE IMPROVED IPO MARKET IN 2014

This Comment was originally completed in February 2014 and relied primarily on information dating back to late 2013.[279] Since then, the IPO market has greatly improved, and EGCs have played a part in this resurgence.[280] With such changes afoot in the financial markets, I believe it is necessary to revisit some of my previous commentary.

In 2014, the U.S. IPO market was the strongest it had been since 2010 in terms of total proceeds.[281] Recent data suggest that the JOBS Act may have been a factor in this improvement.[282] In fact, over 80% of 2014 IPOs were EGCs and took advantage of some type of scaled reporting.[283] Not only has the market improved, but also more companies are taking advantage of the JOBS Act provisions that make going public easier and cheaper.[284]

While there is no doubt that the IPO market has improved and that EGCs have played a large role in this, it is still unclear whether and how the JOBS Act has helped in this turnaround. First, the fact that most recent IPOs have been EGCs says little about the JOBS Act's effectiveness because Title I's high revenue cap allows most companies going public to qualify as EGCs.[285] In fact, the percent of recent IPOs that were EGCs (87%) is slightly less than the percent of would-have-been EGCs that went public in the two years prior to the JOBS Act's enactment (89% of IPOs).[286]

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279. *See, e.g.*, ERNST & YOUNG, *supra* note 122, at 7.

280. Jackie Kelley, *JOBS Act Plays a Part In Today's IPO Boom Market*, FORBES, Oct. 8, 2014, 10:02 AM, http://www.forbes.com/site/ey/2014/10/08/jobs-act-plays-a-part-in-todays-ipo-boom-market/ (concluding that the JOBS Act has had a role in the recent IPO "boom").

281. *2014 IPOs Raise Highest Proceeds Since 2000, According to PWC's Deals Practice*, PRICEWATERHOUSECOOPERS LLP (Dec. 9, 2014), http://www.pwc.com/us/en/press-releases/2014/q4-2014-ipo-watch-press-release.jhtml?gclid=CI7B8p2fgMQCFY17fgodMhMATg. The IPO market's recent strong run began in the second half of 2013. ERNST & YOUNG, THE JOBS ACT: 2014 MID-YEAR UPDATE 5 (2014), *available at* http://www.ey.com/Publication/vwLUAssets/EY-the-JOBS-Act-2014/%24FILE/EY-the-JOBS-Act-2014.pdf.

282. ERNST & YOUNG, *supra* note 281, at 1.

283. *Id.* ("EGCs have dominated the IPO market, representing 84% of IPOs that have gone effective.").

284. Latham & Watkins reports that a greater percentage of companies took advantage of JOBS Act provisions in the JOBS Act's second year. LATHAM & WATKINS, THE JOBS ACT TWO YEARS LATER: AN UPDATED LOOK AT THE IPO LANDSCAPE 4 (2014), *available at* http://www.lw.com/thoughtLeadership/lw-jobs-act-ipos-second-year. One notable exception is that fewer EGCs opted for the extended phase-in period for new accounting standards. *Id.*

285. *See supra* Part IV.A

286. In 2013 and the first half of 2014, there were 333 EGC IPOs out of a total of 384 IPOs.

However, more EGCs are beginning to take advantage of certain cost-cutting measures such as scaled disclosure.[287] The number of EGCs filing less than three years of audited financial statements and less than five years of selective financial data has increased,[288] but the majority of these issuers are still relatively small companies compared to those that file full disclosures.[289] Further, in the first half of 2014, there were fewer EGCs electing to extend the accounting standards transition period than in 2012 or 2013.[290] The JOBS Act's encouragement provisions have continued to grow in popularity, but there is still no data that shows how these provisions are actually encouraging EGCs to go public.[291] Finally, analysts' communications with investors remain unchanged compared to communications prior to the JOBS Act.[292]

If the JOBS Act is only playing one part in the resurgent IPO market, what is causing the increase in issuances? Factors that cannot be ignored include an improved U.S. economy, renewed financial market stability, and increased investor confidence.[293] Regardless of the cause, the IPO market's

ERNST & YOUNG, *supra* note 281, at 5; *cf. supra* note 140 and accompanying text.

287. *See supra* note 284.

288. The amount of EGCs using two years of audited financial statements has only increased from 34% to 53% between November 2013 and August 2014. *Compare* ERNST & YOUNG, *supra* note 122, at 8, *with* ERNST & YOUNG, *supra* note 281, at 9.

289. Kelley, *supra* note 280; *cf. supra* note 147.

290. The SEC prefers the use of additional risk factor disclosures when an EGC elects to use the accounting transition period. ERNST & YOUNG, *supra* note 281, at 13. This may explain EGCs' current hesitation. It also demonstrates how market forces tend to encourage greater disclosure. *See supra* notes 210–14 and accompanying text.

291. As noted above, surveys of EGC executives that recently took their companies public may shed light on Title I's encouragement in the same way that the IPO Task Force surveyed CEOs prior to the JOBS Act. *See supra* note 253; *see also* IPO TASK FORCE, *supra* note 10, at 38. The JOBS Act encouragement provisions include scaled executive compensation disclosures; confidential registration filings with the SEC; and relaxed testing the water provisions. *See supra* Part V.B. Eighty-five percent of EGCs submitted registration statements confidentially since the JOBS Act's enactment. ERNST & YOUNG, *supra* note 281, at 8. Ninety-six percent of EGCs used scaled executive compensation disclosures between January and June of 2014. *Id.* at 12. In late 2013 and early 2014, testing the water provisions became more popular as well. LATHAM & WATKINS, *supra* note 284, at 5.

292. In April 2014, Latham & Watkins was still not aware of any pre-deal research reports. LATHAM & WATKINS, *supra* note 284, at 16; *cf. supra* note 270.

293. In the second and third quarters of 2014 the U.S. economy grew by approximately 5%. Josh Mitchell, *U.S. Economy Hits Speed Bumps*, WALL ST. J., Jan. 30, 2015, 6:58 PM, http://www.wsj.com/articles/u-s-gdp-growth-slows-to-2-6-in-fourth-quarter-1422624685. These terrific numbers assured investor's confidence in the U.S. market. Russ Garland, *Venture Investors*

current strength is an encouraging sign of an improving U.S. economy and stock market.[294] EGC offerings have played a large role in this revival by accounting for the majority of IPOs in 2014.[295] Yet, it still remains unclear whether the JOBS Act is causing the increase in IPOs or merely helping EGCs that would have gone public regardless.[296] As the old adage goes, correlation does not necessarily imply causation.

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*Highly Confident in U.S., But Not in Government*, WALL ST. J. (Aug. 13, 2014, 12:39 AM), http://blogs.wsj.com/venturecapital/2014/08/13/venture-investors-highly-confident-in-u-s-but-not-in-government/. In August 2014, investor confidence was at a 3-year high. *Id.*

294. *See supra* note 281 and accompanying text.

295. *See supra* notes 282–83 and accompanying text.

296. Congress should continue to reevaluate the effectiveness of this legislation. *See supra* Part VI.

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